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In the Supreme Court of the United States

No. 414

OCTOBER TERM, 1962.

MICHAEL SHENKER,

Petitioner,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT.

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STATUTES INVOLVED.

In addition to the statutes set forth in the brief of petitioner, the following are pertinent.

Rule 33 of the Rules of the Third Circuit Court of Appeals provides:

"RULE 33. Petitions for Rehearing

(1) *When Filed—Form—Oral Argument.* A petition for rehearing may be filed with the clerk of this court within 15 days after judgment is entered, unless the time is enlarged by order of the court. It must be printed, and briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument and will not be granted, unless a judge who concurred in the judgment desires it, or the court or the division which rendered it so determines."

28 U. S. C. § 46(d) provides:

"(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

QUESTIONS PRESENTED.

Petitioner's statement of the questions presented misstates the true issues. The following is a correct and accurate statement of the questions presented by this case:

(1) Is it within the power and/or discretion of a federal court of appeals to deny a petition for rehearing *en banc* when neither a majority of the 3-judge panel which originally decided the case nor a majority of all active judges of the circuit voted to grant such petition?

(2) Is a jury question of railroad negligence presented under the Federal Employers' Liability Act when plaintiff was injured in the course of his railroad duties but on the premises of another railroad and solely by reason of the defective door of a baggage car of such other railroad which defendant had no opportunity whatever to inspect, discover, or correct?

STATEMENT OF THE CASE.

As indicated by the above statement of Questions Presented, the issues this case are largely of a legal, rather than a factual, nature. Since there is comparatively little dispute as to the operative facts, petitioner's statement thereof is in the main acceptable to respondent. However, because it does require amplification in several respects, the statement which follows is intended in the interest of clarity to be a "full presentation of all that is material to the questions presented," as required by this Court's Rule 40(1) (e).

The Nature of Petitioner's Case. Petitioner's suit in the Western District of Pennsylvania proceeded to trial against two defendants, the Pittsburgh & Lake Erie Railroad Company (hereinafter "P&LE") and respondent (hereinafter sometimes "B&O"). Petitioner's action against the P&LE was brought both under the FELA, upon the theory that when injured petitioner was temporarily in its employ, and under the common law pursuant to the court's diversity jurisdiction. The action against the B&O was brought solely under the FELA.

Petitioner's Place of Work. Although the pleadings of the parties alleged that the P&LE had been permitted by the B&O to use "its tracks, station, employees, and facilities for the taking on and discharge of freight" at New Castle, Pennsylvania, and that petitioner was so engaged at the time of his injury (R. 5, 10), the proofs at trial developed a very different picture, as the trial judge recognized (R. 31). The evidence as to the nature and ownership of the two railroads' facilities at New Castle was summarized in a stipulation which was received in evidence and in effect amended the pleadings:

> "4. It is hereby stipulated that the Pittsburgh & Lake Erie Railroad Company had one westbound track and one eastbound track with a platform and waiting room at Mahoningtown, New Castle, Pa. B & O Railroad had one westbound track and one eastbound track with a platform and passenger station which station was north of the B & O tracks. No P & L E trains came over the B & O tracks. However, B & O employees would service P & L E trains stopping at Mahoningtown, New Castle, Pa., and running on P & L E tracks. The baggage carts or trucks were owned by the B & O Railroad and the employees operating the baggage cart or trucks were paid by the

> B & O Railroad. The ticket agent at the B & O station was paid by the B & O Railroad. However, he would sell some P & L E and B & O tickets." (R. 61-2.)

The record further shows that the P&LE station consisted simply of platform and public passenger waiting room, while the B&O station included a platform, waiting room, rest rooms, and a ticket office. (R. 29, 40.)

Petitioner's Duties. It was at these separate but adjacent railroad facilities that petitioner was employed. According to his own description, his duties were those of baggage man, mail man, caller, and janitor. (R. 16, 24.) As baggage and mail man his work consisted of servicing (*i.e.*, loading and unloading mail and baggage from) some five or six trains daily during the course of his 7 p. m.-7 a. m. shift. Though not entirely clear, it appears that about three or four of these were P&LE trains, while two were those of the B&O. (R. 21, 25, 47.) His duties as caller included the alerting for work of B&O train-crew members living near the station. This was done both by telephone and by personal visit to their homes. (R. 29, 45.) Petitioner's janitor work consisted of keeping both P&LE and B&O stations clean and sanitary. (R. 29, 45.) There is no record evidence as to what percentage or proportion of petitioner's time was spent on the premises or in the service of each railroad, but it was uncontradicted that his pay check came (at least in the first instance) from the B & O. With the exceptions hereafter noted, so did his work instructions. (R. 46.)

Petitioner's Employment Status. It was thus undisputed that at the time of his injury, petitioner was in the general employ of the B&O. Surprisingly, however, in view of his FELA claim against the P&LE, the record is in

a very uncertain state as regards his relationship to it, and the P&LE's relationship to the B&O. Such questions as were asked on this subject came mostly from the trial judge (*e. g.*, R. 29, 39-40, 45-6, 49-50), and no effort whatever was made by petitioner to introduce evidence as to (1) the manner in which the two carriers regulated between themselves the daily operation of the two stations; (2) how the P&LE transmitted to the B&O information as to P&LE trains requiring service; (3) what control, if any, was reserved by the P&LE to refuse the services of a particular B&O employee; or (4) how the two railroads accounted between themselves for the cost of operating the two stations. As bearing upon petitioner's status as an employee of the P&LE, however, the following may be noted.

Contrary to the assertion at page 4 of petitioner's brief* that he was subject only to the authority of B&O supervisory employees, his own testimony was uncontradicted that at the moment of his injury he was in the act of complying with instructions given him by the P&LE baggage man, who was a member of the crew of the P&LE train. He said that after he had been told by the baggage man that the door would not open to its full width, "Baggage man told me, get it out the best we could, throw mine around the corner." Again, "Well, we can't get it open, so do it the best way we can" (R. 17), which is exactly what petitioner was doing when he was hurt.

As to the relationship between the two railroads it may be judicially noted** that as of the date of petitioner's accident there was no common control by stock ownership

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* Hereafter cited as "PB ."

** *Terminal R. R. Assn. of St. Louis v. Kimbrel*, 105 F. 2d 262, 263-4 (C. C. A. 8th, 1939); *Murray v. Union Pacific R. Co.*, 77 F. Supp. 613, 614 (D. C. Ill., 1948).

or otherwise between them and they were complete strangers to each other except to the limited extent indictated by the "arrangement" at New Castle which is shown in evidence.*

The Accident. There is no dispute on this appeal concerning the manner in which petitioner was injured. Suffice it here to say that there was evidence from which the jury could and apparently did believe that the proximate cause of his injury was the defective door of baggage car on P&LE train No. 79 onto which he was loading bags of mail. To petitioner's description of this incident several pertinent facts should, however, be added.

According to the uncontradicted evidence, the operation in which petitioner was engaged when he hurt his back was the transfer of United States mail sacks from Government mail trucks to the train of the P&LE. Petitioner's *entire* testimony as to the source of the mail bags is found in the following answer:

> "A. Well the mail men brought the mail down. I loaded my mail on the truck. I got the mail loaded. I pulled it across the tracks over to the P&LE Station. I spotted my truck where I thought the train would come in and waited for the train." (R. 16.)

Petitioner nowhere clarified exactly where it was that he took delivery of the mail from the "mail men" and loaded it onto his baggage truck. He did state that he pulled the truck across the 75-80 ft. space between the B&O and P&LE stations, and it is therefore probable that the mail was delivered at the former. With the exception

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* In 1956 the P&LE was a wholly owned subsidiary of the New York Central, which was owned and managed entirely independently of the B&O. Interstate Commerce Commission, *Transport Statistics in the United States, 1956*, pp. 510-12.

of this fact, however, the record is clear that the B&O had no connection whatever with or interest in the work being done by petitioner at the time of his injury, and that such work was wholly in the service and for the benfit of the P&LE and the U. S. Post Office. This conclusion is confirmed by the fact that following his injury petitioner delivered mail which he had received from the P&LE train to the mail trucks—presumably the same ones from which the mail delivered to the train had come. (R. 18, 36.)

The Defective Car. According to the uncontradicted evidence, the railroad baggage car, the door of which was defective according to petitioner's testimony, was owned by the P&LE and traveling on its tracks, and both it and petitioner were on the premises of the P&LE at the time of petitioner's injury. Prior thereto, it had been present in the P&LE station for no longer than two or three minutes.* No effort was made to show that the B&O had ever had the car in its possession, that the B&O had notice or knowledge of the fact that the door would not open to its full width, or that such defect had existed for any particular length of time. Indeed, the *only* testimony remotely related to the duration of the defect's existence was petitioner's statement that the P&LE baggage man had "told me about having to report to get the door fixed. Never fixed it yet." (R. 17, 26.)

No Appeal from Directed Verdict for P&LE. At the close of petitioner's evidence, a motion for a directed verdict on behalf of the P&LE was granted by the trial judge on the ground that no diversity of citizenship was present

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* Petitioner was injured in the course of loading outbound mail onto the railroad car. Thereafter, inbound mail was loaded from the car onto the baggage truck. The whole operation consumed no more than five minutes. (R. 17, 18, 21, 36.)

so as to confer jurisdiction upon the court over petitioner's common law cause of action against it. Rulings were then reserved, however, with respect to motions made by both defendants for directed verdicts in the FELA causes of action asserted by petitioner. (R. 55.) At the close of all the evidence, both the latter motions were renewed, at which time the trial court granted that on behalf of the P&LE on the ground that there was insufficient evidence of an employment relationship between petitioner and the P&LE. (R. 76, 78n. 1.) However, proceeding upon the theory that the negligence of the P&LE was legally imputable to respondent (R. 59), the court permitted the FELA case against the B&O to go to the jury, which returned a verdict for petitioner in the amount of $40,000. Notwithstanding the fact that, as hereinafter demonstrated, a jury issue was probably presented with respect to whether petitioner was "employed" by the P&LE at the time of his injury, *no appeal was taken by petitioner from the trial court's action directing a verdict in favor of the P&LE.* (R. 3.)

The Third Circuit's Denial of Rehearing. The facts briefly stated in the last paragraph on page 5 of petitioner's brief are sufficient to delineate the issue (if it is an issue) with respect to the propriety of the Third Circuit's denial of a rehearing, except that it should be noted that such petition for rehearing by its terms sought a rehearing *en banc.* (Petition for Rehearing, pp. 1, 7.)

SUMMARY OF ARGUMENT.

1. This Court has held that 28 U. S. C. § 46(c) grants power to the courts of appeal to hear and rehear cases *en banc* in accordance with whatever reasonable procedure the respective circuits may find convenient. By its Rule 33, the Third Circuit has chosen to interpret the statute literally, and pursuant thereto, has uniformly denied applications for rehearing *en banc* unless an absolute majority of five of its eight active judges, or one of the judges concurring in the original three-judge decision, votes in favor thereof. Since only four judges, not including either of the concurring judges of the original panel, voted in favor of an *en banc* rehearing in the instant case, the application therefore was properly denied. Moreover, under these circumstances and in the light of the purposes of the statute disclosed by its legislative history, the Court was probably without power to grant a rehearing *en banc*. A contrary interpretation of the statute would impair the usefulness of the *en banc* procedure.

2. Petitioner has expressly conceded that his case against respondent does *not* depend upon the imputation to respondent of the negligence of the P & L E. Therefore, the only question requiring decision is whether respondent's failure to discover the defective door presented a jury issue of negligence under the FELA. Under the pertinent FELA authorities, the railroad is liable only for its negligence, and where the employee's proof shows injury by reason of defective premises or equipment, jury issues are presented only where it is shown that the railroad had knowledge or notice of the existence of the defect. In this case, it is undisputed (a) that respondent had itself no responsibility for the creation of

the defect; (b) that no employee of respondent other than petitioner had any opportunity to discover the defect; and (c) that no means were available to respondent to have discovered it by inspection. Accordingly, it was error to overrule respondent's motion for a directed verdict.

3. If petitioner had adduced the necessary proof, it is probable that he could have made out a submissible FELA case against the P&LE, since under either one or both of two parallel lines of authority, he was probably entitled to the benefits of the Act as an "employee" of the P&LE. His right to recover for personal injury was thus fully protected under the Act, but by virtue of his failure to appeal from the trial court's direction of a verdict in favor of the P&LE, he must be held to have abandoned his rights thereunder.

4. In the absence of proof of railroad negligence, it is no answer to say that the employee has the right under the FELA to rely on his employer and none other. Whenever the employee is injured on duty through the negligence of a third party and the employer is not on notice of the risk thereby created, the employee must necessarily look to the third party for vindication of his rights. A contrary rule would convert the FELA into an open-ended, jury-administered, workmen's compensation statute.

ARGUMENT.

I. SINCE LESS THAN A MAJORITY OF THE ACTIVE JUDGES OF THE COURT BELOW VOTED TO GRANT A REHEARING EN BANC, DENIAL THEREOF WAS PROPER AND PROBABLY MANDATORY.

Under the heading of Question 1, petitioner argues in effect that the favorable vote of four of the eight active judges of the court below entitled him as of right to a rehearing *en banc* before that court, and that it was without discretion to deny such rehearing. Petitioner's contentions in this regard are erroneous because (1) the denial of rehearing below was in strict accordance with both rule and practice in the Third Circuit which petitioner is without standing here to challenge; and (2) such rule and practice are not only a permissible exercise of the Court's discretionary rehearing power but also are probably required by a proper construction of 28 U. S. C. § 46(c). These reasons will be discussed in the order indicated.

A. Denial of Rehearing Was Mandatory Under Rule 33 of the Third Circuit.

In the court below, the case was heard by a 3-judge panel, a majority of which (Judges Goodrich and Ganey) reversed and entered final judgment for respondent, with a dissent being filed by Judge Kalodner. Petitioner thereupon sought a rehearing "before the entire court" (Petition for Rehearing, p. 7), thus invoking the procedure set forth in the Third Circuit's Rule 33, which provides in pertinent part as follows:

> "A petition for rehearing may be filed with the clerk of this court within 15 days after judgment is entered, unless the time is enlarged by order of the court. * * * *Such a petition is not subject to oral*

> *argument and will not be granted, unless a judge who concurred in the judgment desires it, or the court or the division which rendered it so determines.*" (Emphasis supplied.)

Under the above rule, petitioner would have been entitled to a rehearing: (1) if either of Judges Goodrich or Ganey had so voted; (2) if a majority of the original panel had so ordered; or (3) if "the court" so determined. Since Judges Ganey and Goodrich both voted to deny the petition, the only open question within the framework of the rule is whether the 4-2 vote favoring rehearing constituted a granting of the petition by "the court." A review of the Third Circuit's own interpretations of its rule makes clear that it did not.

The most thorough and concise exposition of the Third Circuit's practice with regard to rehearings is set forth in an article by Judge Albert Maris of that court entitled "Hearing and Rehearing Cases En Banc," published in 14 F. R. D. 91 (1953), recently characterized by this Court as "an enlightening discussion * * * of the thorough administrative machinery worked out by the Court of Appeals for the Third Circuit." *U. S. v. American-Foreign S. S. Corp.*, 363 U. S. 685, 688n.5 (1960). Judge Maris makes inescapably clear that the Third Circuit has uniformly interpreted the word "court" in this context to mean an absolute majority of *all* active circuit judges. See 14 F. R. D. at p. 95.* The Third Circuit decisions involv-

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* Judge Maris expresses this conclusion in terms of the *number* of judges—four—then necessary to vote a rehearing. However, his article was written at a time when the court consisted of only seven judges, rather than the eight who were appointed and active when the present petition for rehearing was denied. Since the effective date of the increase (May 19, 1961—P. L. 87-36, § 1[b], 75 Stat. 80), five rather than four votes have been required to constitute a majority. See, *e.g.*, *Unto v. Moore-McCormack Lines*, 293 F. 2d 26, 27 (C. A. 2d, 1961); *Comment*, En Banc Procedure in the Federal Courts of Appeals, 111 U. Pa. L. Rev. 220, 223n.35 (1962).

ing the practice bear Judge Maris out. *Brown v. Dravo Corp.*, 258 F. 2d 704, reh. den. 258 F. 2d 709 (C. A. 3d, 1958), cert. den. 359 U. S. 960 (1959); *Bishop v. Bishop*, 257 F. 2d 495, reh. den. 257 F. 2d 501 (C. A. 3d, 1958) cert. den. 359 U. S. 914 (1959).

Thus, a rehearing *en banc* in the present case on the basis of only four favorable votes would have represented an unprecedented departure both from the text of Rule 33 and from the court's uniform prior practice.

B. The Third Circuit's En Banc Procedure Is Proper Under the Decisions of This Court, and Probably Mandatory Under the Statute.

The Statute. The statutory provision which confers upon the court of appeals the power to hear and rehear cases *en banc* is 25 U. S. C. § 46(c), which provides as follows:

> "Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges who are *in active service*. A court in banc shall consist of all active circuit judges of the circuit." (Emphasis supplied.)

As hereinabove shown, it is the Third Circuit's practice under its Rule 33 to deny rehearing *en banc* unless an absolute majority of all active circuit judges (including any who are temporarily unavailable) vote to grant one. As Judge Maris stated, "In this respect the court follows literally the provisions of Section 46(c)." 14 F. R. D. 91, 93. Petitioner contends, however, not only that this produces an "absurd result" under the facts of the present case, but also that the court had neither power nor discretion to read the statute in such literal fashion. Neither contention is sound.

This Court's Interpretation of the Statute. Since its enactment in 1948, Section 46(c) has been before this Court twice. *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U. S. 247 (1953); *U. S. v. American-Foreign S. S. Corp.*, 363 U. S. 685 (1960). In the *Western Pacific* case, petitioners sought a determination in this court that they were entitled as of right under the statute to a rehearing *en banc*, which had been denied by the court below. The Court held that while litigants should be left free to "suggest" that a case is appropriate for *en banc* treatment, such rehearings are *not a matter of right*. It said:

> "*In our view, § 46 (c) is not addressed to litigants. It is addressed to the Court of Appeals.* It is a grant of power. It vests in the court the power to order hearings *en banc*. It goes no further. It *neither forbids* nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing *en banc*. *The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing.*" (345 U. S. at 250; emphasis supplied.)

The courts of appeals were thus held to possess a "wide latitude of discretion" to devise "any procedure convenient to the court" (245 U. S. at 259, 259n.), including that of delegating responsibility to the original 3-man panel to "initiate" *en banc* hearings. However, this Court carefully cautioned the circuit courts to be "mindful * * * that the statute commits the *en banc* power *to the majority of the active circuit judges* * * *." (345 U. S. at 247; emphasis supplied.) It is significant that on remand to the Ninth Circuit for proceedings consistent with the opinion, that court promulgated a rule requiring approval of a majority of *both* the original panel *and* the full court

and again denied rehearing (205 F. 2d 374, 206 F. 2d 495), subsequent to which two attempts at certiorari were denied. 346 U. S. 910, 950.

In its 1960 decision in *U. S. v. American-Foreign S. S. Corp.*, 363 U. S. 685 (1960), this Court reiterated its *Western Pacific* holding that the courts of appeals are free to devise their own machinery "to provide the means whereby the majority may order a rehearing *en banc*," and held that retired judges are not included within the meaning of the phrase "active circuit judges," since until amended by Congress, those words should not be construed to mean "anything else than what they say." 363 U. S. at 689, 690-1.

The suggestion that the 4-2 vote in the court below was in effect a granting, rather than a denial, of rehearing, is therefore clearly without merit. Although the Third Circuit might have delegated the rehearing power to less than its full number, the fact is that it did not do so, preferring instead to require the favorable vote an *absolute* majority as a predicate to rehearings *en banc*. In *Western Pacific*, this Court expressly held that procedure to be within its discretionary power (*i.e.*, not "forbidden") under the statute. Moreover, since § 46(c) is addressed to the courts rather than to the parties, petitioner's rights thereunder were exhausted upon the court's rejection of his "suggestion" that a rehearing would be appropriate, and he has no standing to challenge that action here. 345 U. S. at 250, 257. For these reasons alone, petitioner's contentions must fail.

The Statute's Legislative History. However, additional and perhaps stronger support for the result below may be found in a facet of the statute's legislative history not heretofore expressly considered by this Court.

As noted in the *Western Pacific* case, *supra*, 345 U. S. 247, the original version of Section 46(c) took the following form:

> "(c) In each circuit cases shall be heard and determined by a court or division of not more than three judges unless a hearing or rehearing before the court in banc is orderd by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges *present and available* in the circuit." (Emphasis supplied.) H. R. 3498, 79th Cong., 1st Sess. Quoted 345 U. S. at 254n. 10.

Although petitioner's contentions would perhaps be well taken if the statute had been enacted in this form, the fact is that as finally enacted, the italicized phrase "present and available" was omitted from the last sentence.* Although no specific explanation of the omission appears from the legislative history, it plainly can have had no other purpose but to eliminate any possibility that the decision of an original 3-judge panel might be reheard or overturned by a court supposedly sitting "*en banc*," but which actually—because of temporary absences—consisted of something less than the full appellate bench. Nor is it difficult to understand why this objective was a legitimate matter of congressional concern. In his concurring opinion in *Cafeteria & Restaurant Workers Union v. McElroy*, 284 F. 2d 173 (C. A. D. C., 1960) Judge

* In apparent anticipation of respondent's reliance upon this aspect of the legislative history, petitioner quotes (PB 9) from the *Western Pacific* case this Court's statement that the two drafts "did not differ in any material respect." 345 U. S. at 254. However, that language can be read only as meaning that there was no difference between the two drafts *material to the questions there presented*, which did not include the issue here framed by petitioner.

Danaher* quoted as follows from a letter dated February 14, 1941, from Judge (now Chief Judge) Biggs of the Third Circuit in which he reported to Congress the recommendation of the Judicial Conference that the then pending counterpart of Section 46(c) be adopted into law:

> "* * * Judge Biggs noted that the Conference deemed it advisable that all the active and available judges of the circuit should be included 'to avoid any ground for suspicion that particular judges of the court, more than three but less than all, were selected to bring about a particular decision.' He added: '*It was to avoid the determination of decisions by a minority of judges, although in the utmost good faith, that did not represent the judgment of the court as a whole, that the measure was recommended by the Judicial Conference* * * *.'" (Emphasis supplied; 284 F. 2d at 190.)

Similar policy considerations were perceived by this Court in the *American-Foreign Steamship* case, 363 U. S. at 690, where it was said that the purpose of *en banc* procedure was to enable the active circuit judges to determine the "major doctrinal trends of the future" for their court.

It is obvious that these important purposes would not be served by a procedure which would substitute for the judgment of the original panel the decision of some number of circuit judges greater than three but less than all, since in that event the questions presented would be settled for the future with no more certainty than they were by the original panel, nor would the ground of "suspicion" envisaged by Judge Biggs be eliminated. Thus,

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*As a senator, Judge Danaher himself played an important role in the enactment of § 46(c), his remarks on hearing being quoted by this Court in the *Western Pacific* case, 345 U. S. at 252. His interpretation of the legislative history is thus of especial significance.

respondent believes not only that the Third Circuit acted within its proper discretion in denying rehearing in this case but also that the result was probably required by a correct reading of the statute.

The Alltmont Case. A word should be added concerning *Alltmont v. U. S.*, 177 F. 2d 97 (C. A. 3d, 1949), which petitioner cites (PB 9) as demonstrating inconsistent applications of the statute by the Third Circuit. The court's *en banc* opinion in that case contains dictum (occasioned apparently by the court's own doubts as to its power, rather than by the objection of either party) that under 28 U. S. C. § 46(d)* five of its then seven judges could act as a quorum of the court *en banc*, notwithstanding the last sentence of § 46(c). The inconsistency between that case and this is more apparent than real, for the actual decision in *Alltmont* was by five unanimous judges, who *were* a majority of the full active court. It is significant that the court there did *not* hold that three of its participants might render an *en banc* decision over dissents of the remaining two judges. Indeed, the denial of rehearing in the instant case makes plain that the court would have *refused* to act in the *Alltmont* case on the vote of such a simple majority, and would not have affirmed the district court here on the basis of a 4-2 vote.

From what has been said above, it is plain that the Third Circuit's rehearing procedures—far from producing an "absurd result" as contended by petitioner—actually promote the policy of the statute and foster sound judicial administration within the circuit. Petitioner makes much

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* "(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

of the supposed anomalies of the result—the doubts of district judges as to the binding nature of the 3-judge decision below, and speculation as to how the four judges favoring rehearing would have voted on the merits—yet imponderables such as these arise from *every* routine decision of *every* 3-judge court of appeals. Has there ever been a trial judge or appellee whose case has been reversed in a court of appeals who has not felt he might have received better treatment at the hands of a different panel? Yet instead of following the plain and eminently sound requirement of the statute, petitioner would have this Court sanction an *en banc* procedure in which the results in a given case would differ depending upon the vagaries of temporary indisposition or absence of individual judges. Manifestly, this would not achieve the finality of judicial decision which it was the purpose of the statute to promote. Accordingly, petitioner's contentions with regard to Question 1 present no ground for reversal.

II. THE NEGLIGENCE OF THE P. & L. E. WAS NOT IMPUTABLE TO THE B. & O., WHICH HAD NO NOTICE OF THE DEFECTIVE DOOR AND WAS THEREFORE NOT ITSELF NEGLIGENT; PETITIONER HAS ABANDONED HIS F. E. L. A. RIGHTS AGAINST THE P. & L. E.

A. Introduction.

Petitioner's case against respondent was submitted to the jury on the theory that it was incumbent upon respondent to furnish its employees "with reasonably safe cars, appliances and equipment, regardless of who owns them and where they might be located." (Charge of the Court trial transcript, p. 216.)* In its opinion denying respondent's motion for judgment n.o.v., the trial court, obviously recognizing the absence of any proof of negligence on the part of the B & O, attempted to justify the jury's verdict upon the theory that "it was for the P.&L.E. to discharge that duty, and its negligence in failing to do so was the negligence of the plaintiff's employer, B & O., as a matter of law." (R. 80.) Petitioner now expressly concedes, however, that the question "is not whether the negligence of a third party can be attributed to the employer, but whether the employer is itself negligent in breaching its non-delegable duty to exercise reasonable care to furnish its employees with a safe place to work." (PB 11-12.)

Respondent accepts and wholeheartedly agrees that this is the test properly applicable to this case. Respondent believes, however, that under it no jury issues were

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* The trial court's charge is not printed in the Record inasmuch as no exception was taken to it or is urged here by respondent. As hereinafter more fully appears, respondent's position in this Court is that if the proper legal test of liability had been applied by the trial court, no jury issues would have been presented. Hence the overruling of respondent's motion for a directed verdict provided ample foundation for respondent's appeal. No new trial was sought in the district court by either side.

presented, and therefore that the judgment of the court below should not be disturbed.

B. The Scope of Respondent's Duty to Petitioner.

With the issues thus narrowed, the only question remaining for the determination of this Court is whether a jury issue was presented as to respondent's negligence in failing to discover and correct the defect in the door of the P&LE baggage car. Consideration of this question requires at the outset a brief statement of the general legal principles which are applicable.

It has long been the law, of course, that railroad employers are under a duty to employ reasonable care in furnishing employees with a reasonably safe place to work and with reasonably safe cars, equipment and appliances for use therein. This duty is a common law concept imported by Congress into Section 1 of the FELA, and is not relieved by the fact that the place of injury may be off the employer's premises or infrequently or fleetingly visited by the employee. *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350, 352-3 (1943); *Ellis v. Union Pacific R. Co.*, 329 U. S. 649 (1947).

It is also the law, however, that a railroad is not the insurer of the safety of its employees, whether they be on or off its premises. There must be some proof from which the jury can infer with reason that the railroad was negligent; that is, that the injury to its employee was "a reasonably foreseeable consequence of any act or omission of the railroad." *Ringhiser v. Chesapeake & O. R. Co.*, 354 U. S. 901, 903, 905 (1957); *Brady v. Southern R. Co.*, 320 U. S. 476 (1943); *Wilkerson v. McCarthy*, 336 U. S. 53, 61-2 (1949); *New York, N. H. & H. R. Co. v. Henagen*, 364 U. S. 441 (1960); *Inman v. B&O R. Co.*, 361 U. S. 227 (1959).

Numerous cases, many of them cited by petitioner, have applied these principles to fact situations similar to a greater or lesser degree to those at bar. Before proceeding to examine them, however, it is appropriate briefly to discuss certain of the authorities cited by petitioner which are *not* applicable to the present situation.

The "Operational Activities" Cases. Petitioner cites and relies upon a number of decisions in which FELA liability has been imposed upon a railroad upon the reasoning and principles first enunciated by this Court in *Sinkler v. New York Pacific R. Co.*, 356 U. S. 326 (1958), cited at PB 15. It was there held that where the employee is injured through the negligence of an independent contractor to whom the defendant has delegated the conduct of a portion of its public utility "operational activities" (in that case terminal switching), such contractor will be considered the "agent" of the railroad within the meaning of §1 of the FELA, with the result that its negligence will be imputed to the railroad so as to impose liability upon it even in the absence of any fault on its part. Other cases cited by petitioner which proceed at least in part upon this theory are *Denver R. G. & W. R. Co. v. Conley*, 293 F. 2d 612 (C. A. 10th, 1961), cited at PB 13, 17; *Butz v. Union Pacific R. Co.*, 120 Utah 185, 233 P. 2d 332 (1951), cited at PB 15; *Schleuter v. East St. Louis Connecting Ry. Co.*, 316 Mo. 1266, 296 S. W. 105 (1927), cited at PB 16; and *Payne v. Baltimore & O. R. Co.*, 309 F. 2d 546 (C. A. 6th, 1962), petition for certiorari filed December 27, 1962, cited at PB 13, 15, 18.

Petitioner's reliance upon these authorities is misplaced for two reasons, each self-sufficient. First, as already noted, petitioner has expressly conceded that the validity of his jury verdict does not depend on the imputa-

tion to respondent of the P&LE's negligence, which is the necessary foundation of *Sinkler* and related cases. Second and equally important, there is no evidence whatever in the present record from which it may with reason be inferred that the transfer of United States mail by petitioner between the "mail men" and the P&LE's baggage car was in any way related to *respondent's* operational activities. The direct relationship between such mail transfer and the *P&LE's* franchised utility service is discussed in a subsequent portion of this brief. (See pp. 33-38, *infra*.)

To Impose Liability on Respondent, It Must Be Shown Either (a) That It Created the Defect; (b) That It Had Actual Knowledge of Its Existence; or (c) That It Had Been in Existence Long Enough to be Discovered By It. It would serve no useful purpose and would unduly prolong this brief to analyze in detail the many cases defining the nature and extent of a railroad's duty of care to employees who are required to leave its premises in the course of their work. It will be helpful, however, to attempt to summarize the principles to be distilled from these authorities, including those cited by petitioner.

First: With the exception of injuries caused by defective safety appliances, for which a railroad is absolutely liable without proof of negligence, it is not the guarantor of the safety either of its own premises or appliances or those of third parties. *Inman v. Baltimore & O. R. Co.*, 361 U. S. 227 (1959); *New York, N. H. & H. R. Co. v. Henagen*, 364 U. S. 441 (1960).

Second: Before a railroad can be charged with negligent failure to provide a safe place to work—whether on or off its own premises—there must be proof from which it can with reason be inferred that the railroad had actual or

constructive knowledge of the defective condition which renders the place of work unsafe. *Siegrist v. Delaware, L. & W. R. Co.*, 263 F. 2d 616, 619 (C. A. 2d), cert. den. 360 U. S. 917 (1959); *Sano v. Pennsylvania R. Co.*, 282 F. 2d 936, 937 (C. A. 3d, 1960); *Dobson v. Grand Trunk W. R. Co.*, 248 F. 2d 545, 548 (C. A. 7th, 1957); *Atlantic C. L. R. Co. v. Collins*, 235 F. 2d 805, 808 (C. A. 4th, 1956), cert. den. 352 U. S. 942, reh. den. 352 U. S. 982; *Fassbinder v. Pennsylvania R. Co.*, 193 F. Supp. 767 (W. D. Pa., 1961); *Miller v. Cincinnati, N. O. & T. P. Ry. Co.*, 203 F. Supp. 107, 111-12 (E. D. Tenn., 1962).

In the *Siegrist* case, the Court of Appeals said:

> "* * * The doctrine of notice was especially emphasized by the Supreme Court in Ringhiser v. Chesapeake & Ohio Railway Co., 1957, 354 U. S. 901, 77 S. Ct. 1093, 1094, 1 L. Ed. 2d 1268 in which the majority said that there was evidence 'that to respondent's knowledge employees used gondola cars for the purpose.' This essential ingredient was further stressed by the comment that 'there were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that the petitioner would suffer just such an injury as he did.' "

The *Miller* case is also noteworthy for its careful analysis of the present state of the law on this subject. There, after reviewing a number of this Court's recent FELA decisions which were claimed to have dispensed with the necessity of actual or constructive notice to the railroad, the Court said:

> "On the contrary, logic impels one to conclude that so long as liability is predicated upon negligence, as it is under the FELA, no defendant should be held liable for defective equipment of which he neither does nor, in the exercise of reasonable care, should

have knowledge. Each of the above cases cited by the plaintiff which involves the issue of notice, upon careful review, is believed to be in accord with this principle. Other authority is believed to uniformly support it. Kaminski v. Chicago River & Indiana R. Co., 200 F. 2d 1 (C. A. 7, 1952); Waller v. Northern Pacific Terminal of Oregon (1946) 178 Ore. 274, 166 P. 2d 488, cert. denied 329 U. S. 742, 91 L. Ed. 640, 67 S. Ct. 45; Frebes v. Michigan Central Railroad Co., (1922) 218 Mich. 367, 188 N. W. 424; Fassbinder v. Pennsylvania Railroad, (D. C. Pa., 1961) 193 F. Supp. 767. See also 35 Am. Jur., Master & Servant, Sec. 141." (203 F. Supp. at 111-12.)

Third: The amount of evidence which will justify submission to the jury of the question whether the railroad had actual or constructive notice or knowledge will of course depend upon the facts of the individual case. Because of the necessarily factual nature of this determination, general statements of the principles involved are not readily found. However, it is believed that three reasonably consistent lines of decision are discernible:

(1) In cases where the unsafe condition is "recurrent," "long-standing" or "continuous," and therefore necessarily apparent to railroad employees regularly working in the vicinity, the employer may be charged with notice of its existence even in the absence of direct testimony that a co-employee actually observed the condition and failed to correct it.

(2) In cases where the unsafe condition is "newly created," "unusual" or "sporadic," it is held that a jury issue of railroad negligence is made out only where there is such direct testimony.

(3) In cases where the defect comes into existence suddenly and is an isolated, sporadic, or unusual occur-

rence such that no railroad employee has had an opportunity to discover it, no liability attaches.

For the sake of clarity, examples of these three lines of authority will be discussed in reverse order.

Cases Where Railroad Had No Notice. The leading examples of the cases expressing this rule are *Kaminsky v. Chicago, R. & I. R. Co.*, 200 F. 2d 1 (C. A. 7th, 1952), and *Wetherbee v. Elgin J. & E. Ry. Co.*, 191 F. 2d 302 (C. A. 7th, 1951), subsequent appeal reported in 204 F. 2d 755 (C. A. 7th, 1953), cert. den. 346 U. S. 867 (1953), reh. den. 346 U. S. 928 (1954).

In the *Kaminsky* case, plaintiff was injured at night on the sidetrack of a third-party industry on which he was checking cars. He fell into an unused coal pit in the middle of a path which he had frequently used before, the pit having never before been left uncovered. Noting that defendant could be found negligent only if it knew or should have known of the condition, the court reversed and entered final judgment for the railroad upon the ground that the only possible inference was that the defect had existed a short time, perhaps only minutes or hours before the accident. (200 F. 2d at 3-4.)

In the *Wetherbee* case, the employee was killed when a railroad boxcar on which he was riding was derailed on an industry sidetrack by a gray-colored piece of wood which had lodged in the flangeway. On appeal following a jury verdict for plaintiff, the court reversed because there was no proof to indicate either that the railroad was responsible for the board's presence or that it had been there for more than a short time; as the court put it, it was "a new threat to safety." (191 F. 2d at 302.) However, the court remanded for further testimony from another

employee who had preceded the movement on foot and who might have been in a position to see the board. On retrial, it was uncontradicted that he had not been in a position to do so, whereupon a verdict was directed for defendant, which was affirmed on the second appeal.

To the same general effect is *Dobson v. Grand Trunk W. R. Co.*, 248 F. 2d 545, 548 (C. A. 7th, 1957), in which the court emphasized the necessity of proof of the continuance of a defect "over a long period of time," instead of being merely "temporary" or "occasional."

Cases Involving Direct Evidence of Railroad Knowledge. Many of the cases relied on by petitioner fall into this category.

Harris v. Pennsylvania R. Co., 361 U. S. 15 (1959), reversing 168 O. S. 582, 156 N. E. 2d 882 (1959), which in turn reversed 108 O. App. 541, 146 N. E. 2d 744 (1957), upon which petitioner places heavy reliance (PB 12-13) is plainly distinguishable on this basis. There, as shown in the opinion of the Ohio Supreme Court (168 O. S. at 583), the jury found the defendant railroad to be negligent, and made a special finding that the tie upon which plaintiff had been required to walk while lifting a heavy timber was uneven and covered with grease and oil, thus affording an unstable footing. In holding the employee entitled to judgment, this court's brief *per curiam* opinion stated nothing more than that the proofs "justified with reason" the jury's conclusions. However, the opinion of the Ohio Court of Appeals, in which the employee had prevailed, makes inescapably clear (108 O. App. at 544-5) that the ultimate result was predicated not upon the railroad's failure to inspect and discover defects on the premises of another railroad, but upon the fact that plaintiff's foreman, an employee of the *defendant* railroad, had seen and

knew of the slippery and unstable footing on which plaintiff was working, and had in fact refused plaintiff's request for additional help just before his injury.

Chicago & G. W. Ry. Co. v. Smith, 228 F. 2d 180 (C. A. 8th, 1955), cited at PB 17, is likewise in this category. There, plaintiff brakeman fell while carrying a crate of eggs across a walkway made of rotting, uneven railroad ties, one of which rolled or crumbled beneath his foot. Although the opinion is not entirely clear, the walkway had apparently been constructed about six months before by the defendant. To the extent that this is so, it obviously had *actual* notice of the defect. Similarly, the *Schleuter* case, already cited, 316 Mo. 1266, 296 S. W. 105 (1927), imposed liability upon the railroad at least in part upon the ground that the defendant's trainmaster and other employees had actual knowledge of the deteriorated track condition which brought about the derailment. (296 S. W. at 112.)

Cases Involving Hazards of a Permanent or Long-Standing Nature. The remaining cases cited by petitioner are without exception classifiable under this heading, as is readily shown by the following brief statements of the facts of each.

In *Ellis v. Union Pacific Co.*, 329 U. S. at 649 (1947), cited at PB 12, plaintiff's injury was brought about by *permanent* conditions of close clearance on an industrial sidetrack of which the defendant could not help but be aware. Moreover, there was evidence that the railroad was itself responsible for the possibly negligent positioning of a close clearance sign in a location not readily visible to plaintiff. The result is thus justifiable on two separate grounds.

In *Atlantic C. L. R. Co. v. Robertson*, 214 F. 2d 746 (C. A. 4th, 1954), cited at PB 13, plaintiff was run over by an industry switch engine which he could not see or hear because of *chronic* conditions of steam, dust and noise fully known to the defendant. As the court said, "The conditions prevailing in the yard * * * *were not sporadic or unusual, but customary and continuous* * * *." (214 F. 2d at 751; emphasis supplied.)

In *Chesapeake & O. Ry. Co. v. Thomas*, 198 F. 2d 783 (C. A. 4th, 1952), there was testimony that the fireman of the train on which decedent employee was killed was upon notice of the possibly dangerous position of an overhanging pipe. It was also shown that the railroad was on notice that a safety chain used to retain the pipe in a safe location had been missing for a year prior to the accident.

In *Kooker v. Pittsburgh & L. E. R. Co.*, 258 F. 2d 876 (C. A. 6th. 1958), plaintiff was injured when he fell on an icy and slippery path assumed by the court to be on the premises of another railroad. The court held that the fact that defendant had salted the path when slippery on earlier occasions justified submission to the jury of the issue of whether it had exercised dominion over it. The result in the *Kooker* case is thus proper, for although the slippery condition may not have been continuous, the defendant railroad was plainly aware of weather conditions and the resultant hazard to its employees if it failed to salt the path.

In *Beattie v. Elgin J. & E. R. Co.*, 217 F. 2d 863 (C. A. 7th, 1954), cited at PB 13 and 16, plaintiff's fall was caused by grease which rendered slippery the spot where he was required to uncouple cars on an industry's coal dumper. Because the grease was "always" there when the machine

was operating, it was held that the jury was justified in finding that the unsafe condition had existed "frequently and recurringly for such a long time" that defendant was on notice of its existence. The *Kaminsky* and *Wetherbee* cases were distinguished on the ground that the dangers there were "a new threat," had been created "only a short time before," and were "sporadic and occasional." (217 F. 2d at 866.)

Likewise, the accident in *Terminal R. Ass'n. of St. Louis v. Fitzjohn*, 165 F. 2d 473 (C. C. A. 8th, 1948), was caused by the *permanent* presence of a light standard located a scant six inches from the sides of boxcars moving next to the loading ramp of a Government-owned plant, plaintiff having been knocked off the side ladder of a car when he struck the standard.

Reference has already been made to *Chicago & G. W. Ry. Co. v. Smith*, 228 F. 2d 180 (C. A. 8th, 1955), *supra*, p. 28, cited at PB 17. The court also held as follows with regard to the pathway made of rotting ties:

> "The walkway here involved had been in existence for over six months. Defendant had ample opportunity to be fully informed as to the condition of the walkway since its construction." (228 F. 2d at 184.)

The court distinguished the *Kaminsky* case, *supra*, on the ground of the shortness of time that the defect there had been in existence.

It has already been noted that *Butz v. Union Pacific R. Co.*, 120 Utah 185, 233 P. 2d 332 (1951), is distinguishable on the ground that it is an "operational activity" case. The case is further distinguishable from the facts at bar in that it involved permanent conditions of reduced visibility, track curvature, and marginal and unprotected clearance limits, among others, all of which justified sub-

mission to the jury of the question whether the railroad should have foreseen the likelihood of plaintiff's being knocked off the car and taken further precautions.

The *Schleuter* case, 316 Mo. 1266, 296 S. W. 105 (1927), is also an "operational activity" case. But in addition, it was held that even in the absence of actual notice to defendant of the defective track condition, it was on constructive notice thereof because the condition had existed "for at least a year."

Van Horn v. Southern Pacific Co., 141 Cal. App. 2d 528, 297 P. 2d 479 (1956), and *Chicago, G. W. Ry. Co. v. Casura*, 234 F. 2d 441 (C. A. 8th, 1956), both involved injuries to railroad employees by *permanent* defects on industry sidetracks. In the *Van Horn* case, the defect was a wooden manhole lid upon which plaintiff fell because the absence of provision for drainage from the underlying hole had caused it to float and become unstable. The court specifically recognized the necessity of evidence that the condition existed for a long enough time to have been discovered by the railroad, citing and following the *Kaminsky* case in this respect. In the *Casura* case the accident was caused by an industry's open gate which fouled its sidetrack during switching operations. The accident would not have happened had the industry equipped the gate with proper and secure fastenings. These conditions had existed for a long enough period to have been readily discovered by the railroad prior to the accident.

Petitioner's remaining case, *Payne v. Baltimore & O. R. Co.*, 309 F. 2d 546 (C. A. 6th, 1962) is of doubtful value as precedent in view of the pendency of a petition for certiorari filed in this Court on December 27, 1962. But in any event, to the extent that that case turns on the submissibility of the railroad's own negligence, rather

than imputation of that of the industry, the evidence was such that the jury could have found that the ash pile causing the derailment had accumulated because of the industry's "usual custom" of loading ashes over the sidetrack, as it had done for years to the knowledge of the railroad. The *Payne* case is thus not analogous to the present case.

The Railroad Had No Knowledge or Notice Here. Any fair analysis of petitioner's authorities can lead to but one conclusion: that each and every one of them is distinguishable from the facts of the present case, and that the present case belongs in the category of *Kaminsky* and *Wetherbee* cases, where the railroad had no knowledge or notice of the defect or hazard. To recapitulate:

First, since the delivery of mail to and from trains of the P&LE was *not* an "operational activity" of defendant B&O, the latter was not chargeable with the former's knowledge of, or negligent failure to repair, the defective door.

Second, there is no evidence whatever as to how long the door had been defective, *i. e.*, as to the "permanence" of the defect.

Third, even assuming the defect to have been of long standing, it not only was never present on B&O premises and was present on the adjacent P&LE premises for no more than a minute or two before the accident. It was thus physically impossible for any B&O employee other than petitioner to have discovered it. As stated in the *Beattie* and *Kaminsky* cases, it was a "new threat to safety" which no amount of care by the B&O could have eliminated.

C. For Want of Evidence and Failure to Appeal, Petitioner Has Abandoned His F. E. L. A. Rights Against the P. & L. E.

Running throughout petitioner's argument is the assumption, never clearly articulated but necessarily implicit, that railroad employees are or should be entitled to their day in court under the FELA whenever or wherever it is shown that they have been injured during the course of their work. For example, petitioner quotes out of context an excerpt from the *Beattie* case, PB 16, which if interpreted literally would make a railroad negligent if it fails to inspect and make safe any and all premises, equipment and appliances, wherever located, in any case where it is shown "that plaintiff at the time of the accident was in a place where his assigned duties required him to be." (217 F. 2d at 866.) Again at page 15 petitioner quotes passages from the *Butz* and *Payne* cases which, literally applied, would create jury issues upon a bare showing that its employees had been injured on the premises of third parties.

Not only would this rule impose an impossible burden of inspection upon the nation's railroads, but it requires no citation of this Court's frequently reiterated pronouncements to demonstrate that it is not the law. Congress did not enact an open-ended, jury-administered workmen's compensation scheme in passing the FELA. Negligence is still required, and a standard which would impose a greater duty of care *off* railroad premises than on is plainly inconsistent with negligence.

What petitioner fails to recognize is that so long as *negligence* remains the standard, there will inevitably be a large class of cases in which railroad employees will have no choice but to look to third parties for redress of injuries

occurring on duty. Suppose, for example, that petitioner's injury in the present case had resulted from a defective door on the U. S. mail truck to which he delivered the mail bags which he took off the P&LE train. Or suppose that he had met with an accident at the hands of third parties while traveling about the streets of New Castle in the performance of his duty to call B&O train crews. Can there be any question but that in each of these instances petitioner would be remitted to an action against the United States or the third parties, strangers to the railroad, whose negligence caused his injury? Recent decisions of unquestioned correctness have so held. *Spinello v. New York, C. & St. Louis R. Co.*, 173 O. S. 324, 181 N. E. 2d 884 (1962); *Simpson v. Texas & N. O. R. Co.*, 297 F. 2d 660 (C. A. 5th, 1962).

The present case is no different in either fact or principle. Petitioner's proper remedy here, if any, was against the P&LE rather than respondent. In all probability either one or both of two well settled legal doctrines would have afforded him FELA rights as an employee of the P&LE if the proper evidentiary foundation had been laid.

The Loaned Servant Doctrine. Ever since this Court's decision in *Standard Oil Co v. Anderson*, 212 U. S. 215, 221-22 (1909), it has been settled that where a general employer furnishes a servant to a special employer to perform the work of the latter the servant becomes the employee of the special employer so far as master-servant negligence liability is concerned. As applied to FELA actions, it was made clear in *Linstead v. Chesapeake & O. R. Co.*, 276 U. S. 28, 34-5 (1928), that when one railroad furnishes its general employee to another railroad under

an arrangement such that it is the work of the latter, and not that of the employer railroad, which the employee is performing, the employee's right of action for negligent injury in the course of such work is against the special, rather than the general, employer.

Subsequent decisions have consistently applied the *Linstead* rule in both FELA cases (*Shaw v. Monessen S. W. Ry. Co.*, 200 F. 2d 841, 843n.4 [C. A. 3d 1952]; *Byrne v. Pennsylvania R. Co.*, 262 F. 2d 906, 912-13 [C. A. 3d, 1958]) and non-FELA cases. *Denton v. Yazoo & M. V. R. Co.*, 284 U. S. 305 (1931); *Jones v. George F. Getty Oil Co.*, 92 F. 2d 255, 259-60 (C. C. A. 10th, 1937). And as the last-cited case makes clear, the fact that the immediate supervision of the employee comes from the general employer (the B&O in the instant case) is not controlling provided that the special employer (the P&LE) has the power to terminate the work and exclude the employee from the job.

The application of these authorities to the present case would be clearer if the record regarding the B&O-P&LE relationship were not so fragmentary and incomplete. The evidence in this connection was of course readily subject to petitioner's subpoena, but he elected not to avail himself of it. But even on the meager facts which are in evidence, it is apparent that there was a very real possibility that petitioner might have made out an FELA jury case against the P&LE under these authorities, since the work he was doing at the time of his accident was unquestionably that of the P&LE. Moreover, it was the P&LE alone which had the right to originate, schedule, and terminate the work, and it was the P&LE train employee whose instructions petitioner was in the act of carrying out when injured.

The "Operational Activities" Doctrine. Alternatively, petitioner could have bottomed his case against the P&LE on the line of decisions (considered *supra*, pp. 22-23) which confers FELA rights upon employees of independent contractors to whom a railroad has attempted to delegate the conduct of its public utility "operational activities." This Court has not yet indicated whether the rule of the *Sinkler* case, 356 U. S. 326 (1958), which enunciated this doctrine as a test for the determination of the independent contractor's status as an "agent" whose negligence might be imputed to the railroad under § 1 of the Act, is to be applied also to determine whether a given plaintiff is an "employee." At least one subsequent case has so held. *Oregon Shore Line R. Co. v. Idaho Stockyards Co.*, 12 Utah 2d 205, 364 P. 2d 826 (1961); and see *Mazzucola v. Pennsylvania R. Co.*, 281 F. 2d 267, 270 (C. A. 3d, 1960), and *Ward v. Atlantic Coast Line R. Co.*, 362 U. S. 396 (1960).

However, there are a number of earlier cases whose authority has never been questioned holding that employees of third parties whose work is within the scope of a railroad's franchised operational activities are entitled to the benefits of the FELA. *Erie R. Co. v. Margue*, 23 F. 2d 667 (C. C. A. 6th, 1928); *Eddings v. Collins Pipe Co.*, 140 F. Supp. 622 (N. D. Cal., 1956). Moreover, the rule has specifically been held to apply where the employee of one railroad is temporarily engaged in the performance of the operational activities of another railroad. *Atlantic Coast Line R. Co. v. Tredway*, 120 Va. 735, 98 S. E. 560 (1917).

Although one is again confronted with the skeletal state of the record in attempting to assess the impact of the operational activities doctrine on the facts of this case, its application is perhaps somewhat clearer than that of the loaned servant doctrine, for there is no escaping the

fact that it was incumbent upon the P&LE as a matter of law to provide the manpower to handle the mail. Title 39, Code of Federal Regulations, Rev. 1955, § 92.8,* provides:

> "A railroad must furnish the necessary employees to handle mail, *to load and pile mail into and unload mail from storage and baggage cars.*" (Emphasis supplied.)

In the face of this regulation, it is difficult to conceive of a type of railroad work more directly and obviously of an "operational" or public utility nature than that being performed by petitioner *for the P&LE* at the time of his injury.

Neither of the foregoing lines of authority was presented to the District Court in conjunction with its ruling on the P&LE's motion for a directed verdict (see R. 72-6), and as has been observed, no appeal was taken from the granting of that motion. Hence, although petitioner's FELA rights could in all probability have been fully vindicated by development of the necessary facts, the conclusion is inescapable that he has abandoned them.

It is of course no consolation to petitioner that he has mistaken his remedy and thereby forfeited valuable rights which with diligence he might have preserved. But as this Court has had occasion to hold, a decision not to appeal, however mistaken its basis, is a "calculated and deliberate" risk, "such as follows a free choice." One who abandons a right of appeal "cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong * * *.

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* In *Denton v. Yazoo & M. V. R. Co.*, 284 U. S. 305, 307 (1931), the facts of which are probably distinguishable, it was held that the predecessor of this postal regulation made a mail clerk employed by the railroad the special employee of the United States while "engaged in loading United States mail into a mail car, under the direction of a United States postal transfer clerk."

There must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from judgment." *Ackermann v. U. S.*, 340 U. S. 193, 198 (1950). And see *Polites v. U. S.*, 364 U. S. 426, 432, 437-8 (1960).

CONCLUSION.

Petitioner's evidence was insufficient to take this case to the jury against the respondent B&O. Nor can the basic and inescapable failure of evidence be lightly brushed aside on the ground that it is a mere technicality or a "refined concept," as petitioner puts it. (P. B. 11.) Perhaps the most compelling demonstration of petitioner's failure to adduce "even the slightest" evidence of negligence is found in the fact that notwithstanding his many general assertions that respondent "should have been aware of the defective door" (P. B. 18), he nowhere makes any attempt to demonstrate how, by whom and under what circumstances this knowledge could have been imparted to the railroad. In default of such testimony, there are only two possible means by which the judgment for petitioner can be sustained. Adopting petitioner's approach to the case, the factual deficiencies of the record can be glossed over and the verdict upheld upon a simple reiteration of the usual generalities concerning the non-delegable nature of respondent's duty of care. A decision of that sort would preserve petitioner's trial court victory at the inevitable expense of the future administration of the Act, since in that event, the nation's trial and appellate courts would be left to determine as best they could whether the outer limits of railroad liability had been expanded, and if so, to what extent.

Alternatively, this Court might attempt to formulate some sort of new general principle—perhaps by extending

the *Sinkler* doctrine—which would embrace the facts of this case. As to this possibility, it is sufficient to observe that petitioner has expressly relinquished all contentions based on *Sinkler's* principle of imputed negligence and has suggested no other formula which would justify his verdict without converting the FELA into a workmen's compensation statute.

Respondent submits that the decisions of this and lower courts provide fully sufficient guidelines for the resolution of this case, and that no new formula is conceivable consistent with the negligence concept of the statute.

Accordingly, the judgment of the Third Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Dated: February 21, 1963.